No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation. Respondent is Archer and White Sales, Inc.

Henry Schein, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation are wholly owned subsidiaries of petitioner Danaher Corporation. Danaher Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 878 F.3d 488. The district court's opinion denying petitioners' motions to compel arbitration (Pet. App. 18a-38a) is unreported. The magistrate judge's order granting petitioners' motions (Pet. App. 39a-44a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The petition for a writ of certiorari was filed on March 9, 2018, and granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the Federal Arbitration Act, 9 U.S.C. 3, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such

> agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

STATEMENT

This case presents a simple question concerning the interpretation of the Federal Arbitration Act. Under the Act, "parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010) (internal quotation marks and citations omitted). That is because "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the [Arbitration Act] operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The question presented here is whether the Arbitration Act contains an unstated exception to that principle, permitting a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court independently analyzes the merits of the movant's claim of arbitrability and concludes that the claim is "wholly groundless."

Petitioners either manufacture or distribute dental equipment; respondent is a former distributor for certain petitioners. Certain distributorship agreements required respondent to arbitrate disputes "arising under or related to" the agreements, including disputes over arbitrability. Respondent nevertheless filed a complaint in federal court, alleging that petitioners had violated federal and

state antitrust laws by wrongfully terminating or restricting respondent's distributorship rights.

Petitioners moved to stay the litigation and compel arbitration. A magistrate judge initially granted petitioners' motions. But the district court vacated the magistrate judge's order and denied the motions, and the court of appeals affirmed. The court of appeals relied on an earlier decision in which it had recognized the "wholly groundless" exception. And it concluded that the exception was applicable here, thereby arrogating unto itself the authority to decide arbitrability—an authority the parties had delegated to the arbitrator. The court of appeals' decision cannot be reconciled with the Arbitration Act's text or its overarching purpose: namely, to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). This Court should reject the "wholly groundless" exception and vacate the court of appeals' judgment.

A. Background

As this Court is well aware, arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It produces "expeditious results." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it "reduc[es] the cost" of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there has been a long history of "judicial hostility to arbitration." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility

dates from the English common law, which "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510 n.4. Because it was "firmly embedded" in English law, this judicial hostility to arbitration carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). Section 2 of the Arbitration Act—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)—provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

Consistent with Section 2's express mandate and the broader policy underlying the Arbitration Act, courts must "place[] arbitration agreements on an equal footing with other contracts[] and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67 (citations omitted). The Arbitration Act's command that courts enforce arbitration agreements according to their

terms applies in disputes over "gateway" issues of arbitrability, including whether a particular claim falls within the scope of the arbitration provision. See *id.* at 69. And it applies in disputes over the antecedent question of who decides such gateway issues: the court or the arbitrator. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995).

Accordingly, although courts presumptively resolve gateway disputes of arbitrability in the absence of a contractual provision addressing the issue, parties may supersede that default rule by "clear[ly] and unmistakab[ly]" agreeing to "arbitrate arbitrability." *First Options*, 514 U.S. at 944. Where parties include a so-called "delegation provision" in their agreement, it is treated as an "additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on this additional agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. And where parties delegate the authority to decide arbitrability to the arbitrator, the delegation applies to virtually all gateway disputes, including disputes over whether the arbitration agreement "covers a particular controversy." *Id.* at 68-69; see *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

Notably, an agreement need not contain an express delegation provision for the delegation to be "clear and unmistakable." As every court of appeals to have addressed the question has held, an agreement that incorporates rules delegating questions of arbitrability to the arbitrator, such as the rules of the American Arbitration Association (AAA), is sufficiently clear and unmistakable to render the delegation valid and enforceable. See *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Petrofac, Inc.* v. *DynMcDermott Petroleum*

Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); *Fallo* v. *High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix International Co.* v. *Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp.* v. *Remote Solutions, Co.*, 398 F.3d 205, 208, 211 (2d Cir. 2005).

B. Facts And Procedural History

1. Petitioners either manufacture or distribute dental equipment; respondent distributes such equipment. During the relevant time period, respondent had agreements to serve as a distributor for some of the petitioners. J.A. 26-28.

In 2012, respondent filed suit against petitioners in the United States District Court for the Eastern District of Texas, alleging that petitioners had restrained trade in violation of the Sherman Act and state antitrust law. J.A. 23-48. The complaint sought "tens of millions of dollars" in damages stemming from petitioners' alleged agreement to boycott respondent or restrict respondent's sales territories. J.A. 24, 25. The complaint's two counts also included summary requests for unspecified injunctive relief, stating in their entirety as follows:

> Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

J.A. 45, 47. The complaint contained no more detailed allegations concerning the requirements for obtaining injunctive relief. In the six years since initiating this suit, respondent has not taken additional action to seek any form of injunctive relief.

2. Petitioners moved to stay the litigation and to compel the arbitration of respondent's claims. J.A. 12-13; see 9 U.S.C. 3, 4. Petitioners' motions were based on respondent's agreements with manufacturing companies operated by petitioner Dental Equipment LLC. The agreements provided in relevant part:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be Charlotte, North Carolina.

J.A. 58.

Respondent opposed petitioners' motions. As is relevant here, respondent contended that the court should decide whether its claims were arbitrable and that the boilerplate request for injunctive relief in its complaint rendered the entire dispute non-arbitrable. In response, petitioners noted that the arbitration provision incorporated AAA rules delegating questions of arbitrability to the arbitrator. Petitioners further noted that, where (as here) an arbitration provision contains a carve-out for injunctive relief, such a carve-out is routinely understood merely to permit injunctive relief from a court either on a preliminary basis to preserve the status quo *before or during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See, *e.g.*, *Comedy Club, Inc.* v. *Improv West Associates*, 553 F.3d 1277, 1285-1286 (9th Cir.), cert. denied, 558 U.S. 824 (2009); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Erving* v.

Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972).

A magistrate judge—to whom the case had been assigned for all pretrial purposes—granted petitioners' motions. Pet. App. 39a-44a. Citing the incorporation of the AAA rules in the relevant agreements, the magistrate judge noted that the parties had validly delegated arbitrability to the arbitrator, because "those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator." *Id.* at 41a. The magistrate judge then explained that, while on "the most superficial level, [respondent's] lawsuit is clearly an action seeking injunctive relief," the complaint "does not seek *only* injunctive relief," and "damages * * * are the predominant relief sought." *Ibid.*

The magistrate judge accordingly determined that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration." Pet. App. 41a. On that basis, the magistrate judge concluded that the question whether the agreements' carve-out for actions seeking injunctive relief applied to petitioners' claims "should properly be left for the arbitrator to decide," given the parties' delegation of arbitrability to the arbitrator. *Id.* at 42a.

3. Respondent asked the district court to reconsider the magistrate judge's order. More than three years later, the district court vacated the magistrate judge's order and denied petitioners' motions. Pet. App. 18a-38a. Explicitly interpreting the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 26a, the court reasoned that the agreements' exception for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled respondent to go to court on all of its claims. *Id.* at 27a-28a. Of particular rel-

evance here, the court determined that any contrary reading of the agreements' arbitration provision would be "wholly groundless," enabling the court to determine arbitrability regardless of whether the parties had delegated that authority to the arbitrator. *Id.* at 34a-37a.

4. Petitioners filed an interlocutory appeal as of right under the Arbitration Act. See 9 U.S.C. 16(a). The court of appeals affirmed. Pet. App. 1a-17a.

Like the district court, the court of appeals held that its earlier decision in *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014), which had recognized the "wholly groundless" exception, supplied the governing legal rule. Pet. App. 11a.[1] In *Douglas*, as in this case, the court of appeals considered whether to compel arbitration in light of a provision in the parties' agreement delegating the authority to decide arbitrability to the arbitrator. The court of appeals acknowledged that, under this Court's precedents, "[d]elegation provisions * * * normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision." 757 F.3d at 462. But relying on decisions from the Federal Circuit, the court of appeals recognized an exception to that rule where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.'" *Id.* at 463-464 & n.4 (citing *Qualcomm*, 466

[1] Curiously, the court of appeals did not definitively decide whether the parties had "clearly and unmistakably" delegated the authority to decide arbitrability to the arbitrator, even though it (like all of the other courts of appeals to have considered the issue) had previously held that an agreement that incorporates rules delegating questions of arbitrability to the arbitrator constitutes a clear and unmistakable delegation. Pet. App. 6a-11a; see *Petrofac*, 687 F.3d at 675. The court reasoned that it "need not decide [that question] because *Douglas* provides us with another avenue to resolve this [case]: the 'wholly groundless' inquiry." Pet. App. 11a.

F.3d at 1371, and *InterDigital Communications, LLC* v. *International Trade Commission*, 718 F.3d 1336, 1346-1347 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014)). The court of appeals adopted the "wholly groundless" exception over a dissent from Judge Dennis, who contended that the exception "appear[ed] to be contrary to Supreme Court authority" and explained that "questions regarding the scope of the parties' agreement to arbitrate must be addressed in the first instance by the arbitrator." *Id.* at 464, 467.

In this case, petitioners argued that applying the "wholly groundless" exception "would allow the court to construe the bounds of [the] arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place." Pet. App. 14a. But the court rejected that argument, concluding that, "if the ['wholly groundless'] doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes." *Id.* at 15a-16a.

The court of appeals proceeded to determine, based on its own interpretation of the "four corners of the contract," that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" Pet. App. 16a. The court of appeals reached that conclusion despite the magistrate judge's contrary determination that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration," *id.* at 41a, and despite the case law limiting carve-

outs in arbitration provisions for injunctive relief to requests for pre-arbitration or post-arbitration injunctions, see pp. 8-9, *supra*.[2]

5. Petitioners sought a stay of further proceedings in the district court while their appeal was pending. J.A. 21. The district court denied petitioners' stay motion, J.A. 21-22, and the court of appeals (after carrying the stay motion with the merits) did the same, Pet. App. 45a. After the court of appeals' decision on the merits, petitioners filed an application with this Court seeking a stay of further proceedings pending disposition of their petition for a writ of certiorari. See Appl. No. 17-859. The Court granted petitioners' application without recorded dissent, and it subsequently granted the petition.

SUMMARY OF ARGUMENT

Arbitration is fundamentally a matter of contract, and the parties here contracted to give the arbitrator the authority to decide whether the underlying claims are arbitrable. Yet the court of appeals refused to enforce the delegation provision in the relevant agreements on the ground that petitioners' claim of arbitrability was "wholly groundless." The "wholly groundless" exception is foreclosed by this Court's precedents construing the Arbitration Act, and it has no footing in the Act's text or purposes. This Court should reject the court of appeals' adoption of the "wholly groundless" exception and vacate the judgment below.

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[2] Because the court of appeals held that the arbitration clause was inapplicable under the "wholly groundless" exception, it did not reach the question whether "the third parties to the arbitration clause in this case can enforce such an arbitration clause." Pet. App. 17a. The district court did not reach that question either, *id.* at 37a-38a, but the magistrate judge decided it in petitioners' favor, *id.* at 42a-44a.

A. The Arbitration Act embodies a liberal federal policy in favor of arbitration and requires courts rigorously to enforce arbitration agreements according to their terms. As this Court has already explained, that principle applies where the parties agree to have the arbitrator decide the threshold question of arbitrability: that is, whether the parties' arbitration agreement covers the claims at issue. And it applies equally to the threshold question of who should decide arbitrability, the court or the arbitrator. Where the parties clearly agree to delegate gateway issues of arbitrability to the arbitrator—including the authority to *decide* arbitrability—the Arbitration Act requires a court, as a simple matter of contract enforcement, to respect that agreement.

B. A corollary to the foregoing principle is that, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide the issue. This Court has held that, where parties contract to remit their claims to the arbitrator, a court may not preclude arbitration simply because it believes the claims of the party seeking arbitration are plainly meritless. So too, where the issue to be arbitrated is a gateway issue of arbitrability, a court may not wade into the merits of whether a dispute is arbitrable, but must instead remit that issue to the arbitrator—even if it believes that the claim of arbitrability is "wholly groundless."

C. Neither the text of the Arbitration Act nor the policies behind it justify the recognition of a "wholly groundless" exception to the enforcement of an agreement delegating arbitrability to an arbitrator.

1. First and foremost, the "wholly groundless" exception has no basis in the text of the Arbitration Act. All of the potential textual hooks for the exception lack merit. The requirement in Sections 3 and 4 of the Arbitration Act

that a court be "satisfied" before staying litigation or compelling arbitration merely contemplates that a court will assure itself that a valid arbitration agreement exists; it does not authorize judicial intrusion into the merits of issues assigned to the arbitrator. Nor does Section 4's reference to "aggrieved" parties support the "wholly groundless" exception. A party who seeks to arbitrate the issue of arbitrability is necessarily "aggrieved" as soon as a counterparty refuses to arbitrate according to the terms of the parties' arbitration agreement, regardless of the merits of the issue to be arbitrated.

The "wholly groundless" exception is also inconsistent with the saving clause in Section 2 of the Arbitration Act, which provides that agreements to arbitrate—including agreements to arbitrate arbitrability—can be invalidated only under generally applicable contract defenses such as fraud, duress, and unconscionability. Where, as here, the parties have clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator, Section 2 mandates that a court must enforce the delegation according to its terms.

2. Beyond its lack of textual grounding, the "wholly groundless" exception betrays the federal policy in favor of arbitration and disregards the contracting parties' intent. When parties agree to arbitrate disputes between them, they are agreeing to have an arbitrator, rather than a court, assess the merits of their respective positions. The Arbitration Act directs a court to respect that decision. Yet the "wholly groundless" exception would allow a court to address the merits of the claim of arbitrability despite the parties' selection of the arbitrator for that task.

What is more, the "wholly groundless" exception presents significant practical problems. Parties choose arbitration over litigation with the expectation that disputes

will be resolved quickly and efficiently. As the years-long dispute in this case demonstrates, however, the "wholly groundless" exception is anything but efficient; it creates an irresistible incentive for any party with a colorable argument against arbitration to ignore the parties' agreement to arbitrate arbitrability and challenge it in court instead. That can tie up the parties in litigation on the threshold question of who should decide arbitrability. And the vagueness of the "wholly groundless" exception provides additional cause for concern, because a court will be able to refuse to compel arbitration whenever it disagrees with the claim of arbitrability, regardless of whether the claim is truly "wholly groundless" or not—as appears to have occurred here.

Even where a claim of arbitrability is frivolous or otherwise plainly meritless, an arbitrator has the tools to deal with the situation efficiently and expeditiously (and even to impose sanctions, if necessary). The "wholly groundless" exception rests on the assumption that arbitrators will be unable faithfully to discharge their assigned responsibility to decide arbitrability. Yet that is simply another manifestation of the judicial hostility to arbitration that led Congress to enact the Arbitration Act nearly a century ago.

In short, there is no basis in law or logic for imposing on the Arbitration Act a judge-made exception where a court believes a claim of arbitrability is "wholly groundless." The court of appeals' adoption of that exception was indisputably erroneous, and its judgment should be vacated.

ARGUMENT

UNDER THE FEDERAL ARBITRATION ACT, A COURT MUST ENFORCE AN AGREEMENT DELEGATING THE AUTHORITY TO DECIDE ARBITRABILITY TO AN ARBITRATOR, REGARDLESS OF THE MERITS OF THE CLAIM OF ARBITRABILITY

A. The Arbitration Act Mandates Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

1. The Federal Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citation omitted). The Act's primary substantive provision, Section 2, guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its plain terms, that provision requires courts to place arbitration agreements "on an equal footing with other contracts." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

The next two sections of the Arbitration Act—Sections 3 and 4—"specifically direct[] [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). Under Section 3, a party may seek a mandatory stay of litigation pending the arbitration of any issue subject to an arbitration agreement. See 9 U.S.C. 3. And under Section 4, a party may seek a mandatory order compelling arbitration in accordance with an arbitration agreement. See

9 U.S.C. 4. Together with Section 2, those provisions require courts "rigorously [to] enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted).

2. When a party moves for a stay under Section 3 or an order compelling arbitration under Section 4, a "gateway" question of contract interpretation arises: does the parties' arbitration agreement cover the claims at issue? *Rent-A-Center*, 561 U.S. at 67-68. That question of arbitrability raises a second, antecedent gateway question: who should decide arbitrability, the court or the arbitrator? This Court's decisions interpreting the Arbitration Act are clear: if the parties clearly agree to arbitrate such "gateway" issues relating to arbitrability, courts must "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

a. This Court initially addressed the question of who should decide arbitrability—the court or the arbitrator—in the context of labor arbitration, which is governed not by the Arbitration Act but by federal common law. See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957). In that context, the Court concluded that "the question of arbitrability is for the courts to decide." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). At the same time, however, the Court stated that parties could agree to delegate the authority to decide arbitrability to an arbitrator, *ibid.*, by "clearly and unmistakably" expressing that desire in the arbitration agreement, *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986).

b. In the context of arbitrations governed by the Arbitration Act, the Court first addressed the question of who should decide arbitrability in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995). There, the

question presented concerned the appropriate standard of review a court should apply in reviewing an arbitrator's decision on arbitrability. The answer to that question, the Court explained, turned on the underlying question of who "ha[d] the primary authority to decide whether a party ha[d] agreed to arbitrate." *Id.* at 942. And determining the "answer to the 'who' question," according to the Court, was "fairly simple." *Id.* at 943.

"Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute," the Court explained, "so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." 514 U.S. at 943 (citations omitted). Thus, if the "parties agree[d] to submit the arbitrability question itself to arbitration," the arbitrator would have primary authority to decide that question, and a court would review the arbitrator's decision on arbitrability under the same deferential standard applied to the review of all other arbitral decisions. *Ibid.* By contrast, if the "parties did *not* agree to submit the arbitrability question itself to arbitration," the court would have primary authority to decide that question, and it would do so "independently." *Ibid.*

The Court added that "ordinary state-law principles" of contract interpretation would govern the question of whether the parties had agreed to delegate the authority to decide arbitrability to the arbitrator, with an "important" qualification. 514 U.S. at 944. As in the context of labor arbitration, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Ibid.* (alterations, internal quotation marks, and citations omitted). The Court adopted that "interpretive rule," *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), to ensure that the parties specifically intended to have an

arbitrator decide whether a particular dispute is arbitrable. See *First Options*, 514 U.S. at 945.

This Court further elaborated on who should decide gateway issues of arbitrability in *Rent-A-Center, supra*. That case involved claims of employment discrimination by one of the petitioner's former employees. See 561 U.S. at 65. The employee had signed an arbitration agreement covering all disputes arising out of the employment relationship. See *id.* at 65-66. Of particular relevance here, the agreement also provided that the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] [a]greement[,] including[] but not limited to any claim that all or any part of th[e] [a]greement is void or voidable." *Id.* at 66.

Despite the arbitration provision, the employee filed suit in federal district court, arguing that the arbitration agreement was unconscionable. See 561 U.S. at 66. The district court granted the employer's motion to compel arbitration, but the court of appeals held that the district court should have considered the employee's unconscionability argument in the first instance. See *id.* at 66-67.

This Court reversed. The Court began by reiterating that "parties can agree to arbitrate gateway questions of arbitrability"—a rule that "merely reflects the principle that arbitration is a matter of contract." 561 U.S. at 68-69 (internal quotation marks and citation omitted). "An agreement to arbitrate a gateway issue," the Court explained, "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 70. And the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Ibid.* The Court ultimately held that, under the parties' delegation clause (which gave the arbitrator "exclusive authority to resolve any dispute relating to the

* * * enforceability * * * of th[e] [a]greement"), the arbitrator, and not the court, should address the employee's unconscionability argument in the first instance. *Id.* at 68, 72.

In short, when the parties clearly agree to delegate gateway issues of arbitrability to the arbitrator—including the authority to *decide* arbitrability—the Arbitration Act requires a court to "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

B. The Arbitration Act Does Not Permit A Court To Decide For Itself An Issue That Is Properly Submitted To An Arbitrator

A corollary to the foregoing principle is that, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide the issue. Instead, the court merely has the authority to remit the issue to the arbitrator.

In *AT&T Technologies*, *supra*, the Court considered whether the requirement to compel arbitration under a valid arbitration agreement applies regardless of whether the claims of the party seeking arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." 475 U.S. at 649-650. The Court concluded that, when "deciding whether the parties have agreed to submit a particular grievance to arbitration," a court "is not to rule on the potential merits of the underlying claims." *Id.* at 649. A court "ha[s] no business weighing the merits of the grievance," the Court explained, because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650.

The rationale for that principle is a straightforward one: the merits of a claim subject to arbitration have no bearing on the enforceability of the arbitration agreement, because the arbitrator derives his power from the

fact the agreement exists. See *AT&T Technologies*, 475 U.S. at 648-649. After all, "[n]o obligation to arbitrate a * * * dispute arises solely by operation of law." *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974). Rather, parties agree to arbitrate disputes as a matter of contract. And when they do, the parties vest the arbitrator—not the courts—with the authority to decide the merits. When parties contract to remit their claims to the arbitrator, the parties' intent is effectuated by remitting *all* claims to the arbitrator, without regard to their ultimate validity.

That principle applies with equal force when the issue to be arbitrated does not concern the merits of the underlying claims but is instead a gateway issue of arbitrability. When parties agree to delegate the authority to decide arbitrability to the arbitrator, they necessarily empower the arbitrator to decide whether a particular dispute falls within the range of disputes that the parties agreed to arbitrate. Put another way, the parties can be conceived to have entered into a freestanding, antecedent agreement providing that, if any dispute arose between them, the arbitrator would decide whether the dispute must be resolved by arbitration under the parties' subsequent "substantive" agreement. See *Rent-A-Center*, 561 U.S. at 70.

The Arbitration Act thus establishes a precise and logical order of operations. First, a court must look for a clear and unmistakable delegation of arbitrability to the arbitrator. If it finds one, the court must send the dispute to arbitration so that the arbitrator, consistent with the parties' intent in their antecedent agreement, can decide whether all or some of the dispute is arbitrable. Second, if—and only if—the court concludes that the parties did not delegate arbitrability, the court must itself decide whether the underlying claims are arbitrable under the parties' "substantive" arbitration agreement. Even then,

however, this Court has made clear that the merits of the claims do not factor into the analysis. See *AT&T Technologies*, 475 U.S. at 649-650. Only when the parties' agreement does not delegate arbitrability to the arbitrator *and* when a court decides that the underlying claims fall outside the range of issues the parties agreed to arbitrate can a court proceed to consider (and decide) the merits of those claims.

This Court's decisions thus foreclose the proposition that a court can decide arbitrability when the parties delegate authority to decide arbitrability to the arbitrator if the court concludes that the claim of arbitrability is "wholly groundless." As we will now explain, all of the arguments in support of recognizing a "wholly groundless" exception to the enforcement of a delegation provision lack merit.

C. There Is No Valid Basis For A 'Wholly Groundless' Exception To The Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

By incorporating the rules of the American Arbitration Association, the relevant arbitration agreements here clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator, as the courts of appeals have unanimously held. See pp. 6-7, *supra*. In the decision under review, however, the court of appeals held that it could decide arbitrability, notwithstanding any delegation, if it concluded that the claim of arbitrability was "wholly groundless." Pet. App. 14a. The court proceeded to place petitioners' claim of arbitrability in the "wholly groundless" category, *id.* at 16a, even though the magistrate judge had previously determined that there was a

"plausible construction [of the arbitration provision] calling for arbitration," *id.* at 41a-42a.

The court of appeals' reasoning is deeply flawed. There is no valid basis for recognizing a "wholly groundless" exception to the Arbitration Act's mandate "rigorously [to] enforce arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and citation omitted). Such an exception would flout the Arbitration Act's text, betray the federal policy in favor of arbitration, and disregard the contracting parties' intent. The court of appeals erred by refusing to compel arbitration based on the delegation of arbitrability to the arbitrator, and its judgment should therefore be vacated.

1. The 'Wholly Groundless' Exception Has No Basis In The Text Of The Arbitration Act

As in all statutory-interpretation cases, the Court's analysis should begin with the text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). For the reasons discussed above, this Court has already construed the Arbitration Act both to permit parties to delegate the authority to decide arbitrability to an arbitrator, and to preclude a court from deciding for itself an issue that is properly submitted to the arbitrator. The various contrary arguments that have been proffered in support of the "wholly groundless" exception are unavailing.

a. When the Federal Circuit became the first court of appeals to adopt the "wholly groundless" exception to the Arbitration Act in *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (2006), it attempted to ground that exception in Section 3 of the Arbitration Act. See *id.* at 1371. Section 3 provides that a court "shall * * * stay" the litigation

of "any issue referable to arbitration" under a written arbitration agreement "upon being satisfied that the issue * * * is referable to arbitration under [the] agreement." 9 U.S.C. 3. The Federal Circuit held that a court "may conclude that it is not 'satisfied' under [S]ection 3" if it "finds that the assertion of arbitrability is 'wholly groundless.'" *Qualcomm*, 466 F.3d at 1371.

Respondent offered a variation on that argument at the certiorari stage—one it had never previously raised in this case—based instead on Section 4 of the Arbitration Act. See Br. in Opp. 24-25. Section 4 authorizes a court to grant an order compelling arbitration to a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement" if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. 4. According to respondent, a "court assuredly is not 'satisfied' that [an] order compelling arbitration is appropriate" if it believes that "a movant's claim is baseless or illegitimate." Br. in Opp. 25.

Whether it is grounded in Section 3 or Section 4, that argument is incorrect—and this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), illustrates why. There, the Court analyzed whether a court could consider fraud in the inducement of an entire contract—as opposed to fraud in the inducement of the arbitration provision specifically—in determining whether to grant a stay under Section 3 of the Arbitration Act. See *id.* at 396-397. The Court answered that question by looking to the text of Section 4. The Court noted that Section 4 requires a court to compel arbitration if it is "satisfied" that neither "the making of the agreement for arbitration" nor "the failure to comply" with the arbitration agreement is "in issue." *Id.* at 403 &

n.11 (quoting 9 U.S.C. 4). Reasoning that it was "inconceivable" that Congress intended the scope of Section 3 and Section 4 to differ, the Court held that a court "may consider only issues relating to the *making* and *performance* of the agreement to arbitrate" in determining whether to grant a stay under Section 3. *Id.* at 404 (emphases added).

The "wholly groundless" exception plainly has nothing to do with the "making" or "performance" of the agreement to arbitrate—the only things of which a court must be "satisfied" before compelling arbitration under Section 4 (or issuing a stay pending arbitration under Section 3). The "making" of the agreement concerns contract formation: did the parties enter a valid and binding arbitration agreement? And the "performance" of the agreement concerns the nonmoving party's compliance with the agreement: did the party "fail[] to comply" with the agreement by resisting arbitration, so as to require an order compelling arbitration (or staying further litigation) from the court? The "wholly groundless" exception relates neither to the "making" nor to the "performance" of the antecedent agreement at issue here, but rather to the merits of the issue to be arbitrated: namely, the issue of arbitrability.

To the extent the Federal Circuit's contrary argument rested on the specific language of Section 3 rather than Section 4, see *Qualcomm*, 466 F.3d at 1370-1371, it fails for an even more fundamental reason. By its terms, all that Section 3 requires is for the court to "be[] satisfied" that, under the parties' arbitration agreement, the "issue" allegedly "referable to arbitration" is in fact "referable to arbitration." 9 U.S.C. 3. The relevant "issue" here is *arbitrability*, and the relevant "agreement" is the parties' agreement to delegate *arbitrability* to the arbitrator. See

Rent-A-Center, 561 U.S. at 70 (noting that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement * * * and the [Arbitration Act] operates on this additional arbitration agreement just as it does on any other"). Where the parties have clearly and unmistakably agreed to arbitrate disputes over arbitrability, there is no question that those disputes are "referable to arbitration."

b. At the certiorari stage, respondent offered an alternative textual argument in defense of the "wholly groundless" exception. Section 4 permits only "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement" to seek an order compelling arbitration. 9 U.S.C. 4. When a party "files a claim in court that belongs in court," respondent argued, the party cannot be "aggrieved" for purposes of Section 4, because "there is no cognizable prejudice" from bypassing arbitration. Br. in Opp. 25.

That argument—again, one that respondent had never previously raised in this case—is equally invalid and indeed circular. Where the parties have assigned an issue to the arbitrator, a party seeking to arbitrate the issue is the very sort of "aggrieved" party that Section 4 contemplates. Recognizing "the fundamental principle that arbitration is a matter of contract," *AT&T Mobility*, 563 U.S. at 339, the Arbitration Act protects private parties' right to proceed in arbitration according to the terms of a valid arbitration agreement. It does so by "plac[ing] arbitration agreements on an equal footing with other contracts[]" and providing mechanisms for parties to "enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67. It is thus clear that a party is "aggrieved" for purposes of Section 4 as soon as a counterparty refuses to arbitrate according to the terms of the parties' valid arbitration agreement. See, *e.g.*, *Community State Bank* v.

Strong, 651 F.3d 1241, 1256 (11th Cir. 2011), cert. denied, 568 U.S. 813 (2012); *PaineWebber Inc.* v. *Faragalli*, 61 F.3d 1063, 1067 (3d Cir. 1995).

The foregoing argument applies with equal force to arbitrability disputes. In that context, it is the failure to comply with the "antecedent agreement" to delegate arbitrability to the arbitrator, *Rent-A-Center*, 561 U.S. at 70, that leaves a party "aggrieved" and permits it to seek an order compelling arbitration under Section 4. The ultimate merits of the party's claim of arbitrability are irrelevant to whether the party is "aggrieved."

Basing the "wholly groundless" exception on the word "aggrieved" in Section 4 not only is violently atextual, but would potentially lead to an absurd result. Unlike Section 4, Section 3 does not require a party seeking a stay pending arbitration to be "aggrieved": it merely requires that the party be a "party." See 9 U.S.C. 3. As a result, under respondent's reading of the Arbitration Act, a party could obtain a stay pending arbitration even if the claim of arbitrability were "wholly groundless," but it could not obtain an order compelling arbitration of that claim. Thus, even assuming respondent were correct that the "wholly groundless" exception is an intended feature of the Arbitration Act, adopting respondent's purported textual justification for the exception would "make it trivially easy * * * to undermine the Act," *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1428 (2017), because a party could avoid the "wholly groundless" exception through the simple expedient of seeking a stay (unless the Court were to read a similar limitation into Section 3). That is all the more reason to reject respondent's outlandish interpretation of Section 4.

c. Nor could Section 2 of the Arbitration Act—which governs the enforceability of arbitration agreements, including agreements to arbitrate arbitrability—provide a grounding for the "wholly groundless" exception.

Section 2 provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 thus ensures that "agreements to arbitrate are enforced according to their terms," *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted), subject only to the exception in the saving clause. That exception permits invalidation of arbitration agreements only under "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility*, 563 U.S. at 339. The saving clause "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Systems*, 138 S. Ct. at 1622 (internal quotation marks and citation omitted).

The "wholly groundless" exception cannot trigger the saving clause because it is not a "ground[] * * * for the revocation of *any* contract," 9 U.S.C. 2 (emphasis added); instead, it is a doctrine that "appl[ies] only to arbitration." *Epic Systems*, 138 S. Ct. at 1622. Again, "[a]n agreement to arbitrate [the issue of arbitrability] is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center*, 561 U.S. at 70. The delegation of arbitrability to an arbitrator, in other words, is itself an arbitration agreement "enforceable" under the Arbitration Act. See 9 U.S.C. 2. The only function of the "wholly groundless" exception,

however, is to allow a court to refuse to enforce such an "antecedent" arbitration agreement based on the court's view of the merits of the dispute to be arbitrated: *i.e.*, whether the underlying claims fall within the range of issues the parties agreed to arbitrate.

At bottom, the "wholly groundless" exception is no different from other rules that "selectively refus[e] to enforce" arbitration agreements on grounds that do not apply to other contracts—rules this Court has consistently rejected. *Kindred Nursing*, 137 S. Ct. at 1426, 1428; see, *e.g.*, *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987). The Court should likewise reject the "wholly groundless" exception here. Because there is no textual basis for that exception, the court of appeals erred in adopting it.

2. The 'Wholly Groundless' Exception Betrays The Federal Policy In Favor Of Arbitration And Disregards The Contracting Parties' Intent

As we have explained, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). The "wholly groundless" exception promotes neither the Arbitration Act's policy nor its principle; in fact, it affirmatively disserves them.

a. When parties agree to arbitrate disputes between them, they are agreeing to have an arbitrator, rather than a court, assess the merits of their respective positions. The Arbitration Act directs a court to respect that decision: a party that establishes the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. 4 (emphasis added).

In the face of an arbitration agreement, therefore, courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument [that] will support the claim." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). To do so would flout the parties' intent, because "[t]he [parties'] agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Ibid.* As long as the arbitration agreement is itself valid and enforceable, the Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on [arbitrable] issues." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

Those principles apply equally to the parties' "additional, antecedent agreement" to arbitrate questions of arbitrability. *Rent-A-Center*, 561 U.S. at 70. When the parties have agreed to delegate arbitrability to the arbitrator, the initial decision is the arbitrator's—and only the arbitrator's—to make. See *Dean Witter Reynolds*, 470 U.S. at 217. And in that circumstance, a court "ha[s] no business weighing the merits" of arbitrability. *American Manufacturing*, 363 U.S. at 568. If anything, that is all the more true in light of the "interpretive rule" this Court has applied to delegations of gateway issues of arbitrability, which requires a delegation to be "clear and unmistakable." *Howsam*, 537 U.S. at 83. If the parties have clearly and unmistakably agreed to arbitrate questions of arbitrability, a court has no license to ignore the parties' clear intent and weigh in on those questions all the same.

Yet that is exactly what the "wholly groundless" exception contemplates. The exception conflates the question of who *decides* arbitrability with the discrete question

of who *prevails* on arbitrability—and, in so doing, allows a court to address the merits of the claim of arbitrability even though the parties selected the arbitrator for that role. Indeed, courts recognizing the "wholly groundless" exception have forthrightly acknowledged that the exception "necessarily requires [them] to examine and, to a limited extent, construe the underlying agreement." *E.g.*, *Douglas*, 757 F.3d at 463; *InterDigital Communications, LLC* v. *International Trade Commission*, 718 F.3d 1336, 1346-1347 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014). As this Court has repeatedly admonished, however, that is exactly what lower courts should avoid doing in cases in which the parties have agreed to arbitrate.

The circuit conflict surrounding the "wholly groundless" exception arose precisely because certain courts, starting with the Federal Circuit, failed to heed those instructions. Not one of the decisions recognizing the "wholly groundless" exception so much as mentioned this Court's warning not to address the merits of the underlying claim when assessing arbitrability. See *Qualcomm*, 466 F.3d at 1370, 1373 n.5; *Turi* v. *Main Street Adoption Services, LLP*, 633 F.3d 496, 506-511 (6th Cir. 2011); *Douglas*, 757 F.3d at 462-464; *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-529 (4th Cir. 2017), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018). Conversely, each of the courts that did consider this Court's guidance recognized that the "wholly groundless" section flouts it. See *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286-1287 (10th Cir. 2017); *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1271 (11th Cir. 2017); see also *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

In defense of the "wholly groundless" exception, the court of appeals explained that interpreting the parties'

arbitration agreement was necessary to avoid "overrid[ing] the clear intent of the parties[] or reach[ing] a result inconsistent with the plain text of the contract." Pet. App. 16a (emphasis and citation omitted). In its earlier decision in *Douglas*, the court of appeals elaborated on that justification: if the claim of arbitrability was "wholly groundless," the court asserted, "surely [the party opposing arbitration] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." 757 F.3d at 464.

The court of appeals' conclusion, however, does not follow from its premise. The "wholly groundless" exception necessarily assumes that the parties have clearly and unmistakably agreed to arbitrate gateway issues of arbitrability. See Pet. App. 5a-6a. But if the parties have done so, there is no basis for the further assumption that they did not intend to send any and all claims of arbitrability—regardless of their merit—to arbitration. Quite to the contrary, the parties could simply have determined that, like the arbitration of the underlying claims, the arbitration of gateway issues of arbitrability would be simpler, more expeditious, and less expensive than the litigati4on of those issues in court.

Here, there was particularly good reason for the parties—and respondent in particular—to have believed *ex ante* that the delegation of arbitrability to the arbitrator under the rules of the American Arbitration Association (to which the parties agreed in the relevant agreements, see pp. 6-7, *supra*) would be beneficial. The arbitration agreements contained forum-selection clauses providing that any arbitration would occur in North Carolina. J.A. 58. Respondent, however, is based in Texas. J.A. 26.

Agreeing to arbitrate questions of arbitrability enabled respondent to resolve those questions without hir-

ing local counsel in North Carolina. North Carolina permits out-of-state attorneys to participate in in-state arbitrations, see N.C. Rule of Prof'l Conduct 5.5(c)(3) & cmt. 7, and the AAA's rules permit parties to participate "by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law," American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-26 (2013) <adr.org/commercial> (AAA Commercial Rules). The local rules of all North Carolina state and federal courts, however, require the involvement of at least one North Carolina-licensed attorney in all civil proceedings. See N.C. Gen. Stat. § 84-4.1(5); E.D.N.C. Civ. R. 83.1(c)(1), (d)-(f); M.D.N.C. Civ. R. 83.1(c)(1), (d)(1)-(2); W.D.N.C. Civ. R. 83(B)(1).

b. Beyond ignoring the federal policy in favor of arbitration and the intent of the contracting parties, the "wholly groundless" exception presents significant practical problems.

To begin with, parties select arbitration for its "efficient, streamlined procedures," *AT&T Mobility*, 563 U.S. at 344, and its "expeditious results," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The "wholly groundless" exception would effectively nullify those advantages, because it is highly inefficient. Under the exception, a court could preclude arbitration whenever it concludes, based on its own interpretation of the arbitration agreement, that there is not "a legitimate argument that [the agreement] covers the present dispute." Pet. App. 11a. That would create an irresistible incentive for any party with a colorable argument against arbitration to ignore the parties' agreement to arbitrate arbitrability and challenge it in court instead. That party would have to file a lawsuit and contest a mo-

tion to compel arbitration, resulting in a potentially protracted "mini-trial" over arbitrability that would "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). If the moving party wins, the other party could appeal the court's determination on arbitrability as of right. See 9 U.S.C. 16(a). And if the moving party loses, it would presumably have to address the issue of arbitrability again before the arbitrator.

This case well illustrates that problem. Petitioners first moved to compel arbitration in 2012. Yet six years later—a period of time long enough for the parties' underlying claims to have been arbitrated many times over—petitioners, respondent, and the courts are still attempting to resolve the threshold question of who should decide arbitrability. And because the lower courts did not enter stays pending appeal, petitioners had to endure years of costly discovery. In this very case, therefore, the "wholly groundless" exception has trounced the efficiencies for which the parties contracted in agreeing to arbitration.

The vagueness of the "wholly groundless" exception provides additional cause for concern. The facts of this case are again instructive. By its terms, the "wholly groundless" exception would seem to apply only to claims of arbitrability that are truly frivolous. As the magistrate judge recognized, there is a plausible argument in this case—indeed, a plainly correct one—that the relevant agreements that required arbitration of respondent's claims. Pet. App. 41a-42a.

The arbitration provision in the agreements does not apply to "actions seeking injunctive relief," and respondent nominally demanded injunctive relief in its complaint (though it has never actually sought such relief). J.A. 45, 47, 58. But where an arbitration provision contains a

carve-out for injunctive relief, such a carve-out is routinely understood merely to permit injunctive relief from a court either on a preliminary basis to preserve the status quo *before* or *during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See pp. 8-9, *supra* (citing cases). That makes good sense: if respondent could avoid arbitration simply by tacking on a demand for injunctive relief, it would render meaningless the parties' agreement to arbitrate. Betraying its hostility to arbitration, however, the court of appeals disagreed with the magistrate judge, concluded that the foregoing argument was not even plausible, and applied the "wholly groundless" exception. See Pet. App. 16a.

The history of this case thus shows that recognition of a "wholly groundless" exception would be an invitation to mischief. As took place here, some courts will be unable to resist the temptation to refuse to compel arbitration whenever they disagree with the claim of arbitrability, regardless of whether the claim is truly "wholly groundless" or not. And parties will bog down cases with threshold litigation on the applicability of the "wholly groundless" exception.

c. To be sure, there may be cases in which a party seeks to compel arbitration but the claim of arbitrability is plainly meritless. In those cases, however, there is no reason to believe that an arbitrator will be unable to deal with the situation efficiently and expeditiously. The AAA's rules for both commercial and consumer arbitration permit a party to request a determination of arbitrability at a preliminary telephonic hearing to be held as soon as possible. See AAA Commercial Rules R-7(c), R-21(a), P-2(a)(vi)(b); American Arbitration Association, Consumer Arbitration Rules and Mediation Procedures R-14(c), R-21(a)-(b) (2014) <adr.org/consumer> (AAA

Consumer Rules). And the rules for the other major arbitration organization, JAMS, similarly permit an arbitrator to determine his jurisdiction "as a preliminary matter" via telephonic hearing. See JAMS Rules 6(a), 11(b), 16(i) (2014) <jamsadr.com/rules-comprehensive-arbitration> (JAMS Rules). The major arbitration organizations also allow parties to opt into fast-track procedures, further expediting the resolution of disputes over arbitrability. See AAA Commercial Rules, Expedited Procedures; JAMS Rule 16.1. Especially by comparison to the courts, an arbitrator should have no difficulty in efficiently dispensing with a groundless claim of arbitrability.

Moreover, an arbitrator is hardly powerless in the face of a truly frivolous claim of arbitrability. Numerous federal and state courts have recognized the authority of arbitrators under broad arbitration provisions to impose sanctions for bad-faith conduct—for example, by shifting fees and costs to the moving party (where that party does not already bear them). See, *e.g.*, *ReliaStar Life Insurance Co.* v. *EMC National Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009); *Marshall & Co.* v. *Duke*, 114 F.3d 188, 190 (11th Cir. 1997), cert. denied, 522 U.S. 1112 (1998); *Todds Shipyards Corp.* v. *Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991); *Seagate Technology, LLC* v. *Western Digital Corp.*, 854 N.W.2d 750, 762 (Minn. 2014); *Thomas* v. *Prudential Securities, Inc.*, 921 S.W.2d 847, 851 (Tex. Ct. App. 1996). To the extent arbitrators have that power, parties will have even less incentive to assert plainly meritless claims of arbitrability—and there is no reason to believe that parties are routinely doing so in jurisdictions where the "wholly groundless" exception has not been recognized.

In any event, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270

(2009). While respondent has disparagingly suggested that arbitrators might "mak[e] mistakes" on the issue of arbitrability, Br. in Opp. 2 n.1, it is a foundational premise of the Arbitration Act that arbitrators will be "competent, conscientious, and impartial," *Mitsubishi Motors*, 473 U.S. at 634, and fully capable of deciding even the most complex issues, see *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Courts should presume that they can trust arbitrators faithfully to analyze the scope of arbitration provisions and to refuse to allow arbitration of claims that fall outside them. The "wholly groundless" exception is at war with that presumption; in that respect, it represents a return to the bad old days of "judicial hostility to arbitration" that led Congress to enact the Arbitration Act nearly a century ago. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000).

* * * * *

Cases concerning arbitration often require this Court to reconcile an array of considerations, each of which may point toward a different result. This is not such a case. Here, the statutory text, precedent, and policy all support the conclusion that a court may not decline to enforce an agreement delegating questions of arbitrability to an arbitrator merely because the court believes the claim of arbitrability is "wholly groundless." The court of appeals' contrary holding was erroneous, and it cannot be allowed to stand.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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